STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 81 AND ITS LOCAL UNION NOS. 1007, 1267 and 2888, Charging Party,	)	**ULP No. 10-04-739**
v.	)	
DELAWARE STATE UNIVERSITY, Respondent.	)	

Appearances

Perry F. Goldlust, Esq., for AFSCME Locals 1007, 1267 & 2888
Kathleen Furey McDonough, Esq., and Sarah E. DiLuzio, Esq., for DSU

DECISION ON MOTION FOR SUMMARY JUDGMENT

BACKGROUND

Delaware State University ("DSU" or "University") is a public employer within the meaning of §1302 (p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA").

The American Federation of State, County & Municipal Employees, AFL-CIO, Council 81, through its affiliated Locals 1007, 1267 and 2888 ("AFSCME" or "Union"), is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of a bargaining unit of Clerical/Technical employees as defined in DOL Case 167, Plant Maintenance employees as defined in DOL Case 44, and Security employees as defined in DOL Case 61, respectively, within the meaning of §1302(j), of the Act.

The University and AFSCME have a long standing collective bargaining relationship and are parties to three separate collective bargaining agreements which have 2006 -2008 terms, but which remained in effect at all times relevant to this Charge. The parties are currently engaged in collective bargaining for successor agreements

On or about April 20, 2010, AFSCME filed an unfair labor practice charge in which it alleges DSU has engaged in conduct which violates 19 Del.C. §1307 (a)(5), (6) and (7), which provide:

> §1307 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
>
> (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.
>
> (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

Specifically, the Charge alleges, in relevant part:

> On or about March 23, 2010, a letter was sent to Dr. Harry L. Williams, President of DSU requesting certain information be made available to the Union by virtue of rights granted under FOIA as well as under 19 Del.C. Chapter 13. The Union requires the information in order to administer its collective bargaining agreement with DSU and to be prepared for bargaining a successor agreement.
>
> On April 5, 2010, Lance Toron Houston [*Assistant Vice President for Legal Affairs, DSU]*, responded to the March 23, 2010 letter conveying DSU's refusal to provide the information alleging that the request was only made under FOIA and ignoring the duty to provide information as part of DSU's obligation to bargaining in good faith. *AFSCME v. DSU,* Unfair Labor Practice Charge 10-04-739, ¶¶ 3, 4.

On or about April 30, 2010, DSU filed its Answer to the Charge, denying the material

allegations contained in the Charge. The Answer includes the following affirmative defenses to the Charge: 1) Some or all of the information sought by the Union is improper and untimely as a basis for a claimed unfair labor practice charge because the information requested dates back four years, well beyond the 180 day period for filing an unfair labor practice charge, as set forth in 19 Del.C. §1308; 2) The information sought by the Union is not "public record" and is protected from disclosure under FOIA because it pertains to pending or potential litigation; 3) None of the collective bargaining agreements between these parties require DSU to provide the Union with the documents and information it seeks; 4) The Charge fails to state a claim on which relief can be granted; and 5) The claims contained in the Charge are barred by the doctrines of waiver and estoppel.

AFSCME filed its Response to New Matter on May 7, 2010, denying all of the affirmative defenses set forth in the Answer.

On or about April 30, 2010, DSU also filed a Motion to Consolidate the Charge with a separate pending Charge 09-12-725, which AFSCME opposed.

On May 23, 2010, a Probable Cause Determination was issued which stated, in relevant part:

> The Public Employment Relations Act provides that it is an unfair labor practice for a public employer or its designated representative to refuse to disclose any public record as defined by Chapter 100 of Title 29. 19 Del.C. §1307(a)(8). It is well established through PERB case law that the duty to bargain in good faith under the Public Employment Relations Act ("PERA") obligates public employers to provide information to exclusive bargaining representatives that is necessary and relevant to those organizations in performing their representation duties. This obligation has been recognized by Delaware's Public Employment Relations Board, Court of Chancery, and Supreme Court. *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA,* Del.Chan., CA 14383, II PERB 1343 (1996), affirmed *Colonial Education Assn. v. Bd. of Education,* Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA, v.*

Brandywine School District, Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986)); *AAUP v. DSU,* Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001).

The Probable Cause Determination concluded that, when considered in a light most favorable to Charging Parties, the pleadings established probable cause to believe that an unfair labor practice in violation of 19 Del.C. §1307(a)(5), (a)(6) and/or (a)(7) may have occurred. The Executive Director also denied DSU's Motion to Consolidate the two pending unfair labor practice charges because resolution of the information request at issue in the instant charge could impact the processing of the original charge. The processing of this Charge was ordered to be expedited.

Thereafter, on May 27, 2010, AFSCME filed this Motion for Judgment on the Pleadings, alleging "there are no material issues of fact and the law applicable to the unfair labor practice is clear and well settled in Delaware." The Motion was accompanied by supporting written argument.

On June 16, 2010, the Respondent objected to the Charging Party's Motion and filed an answering brief setting forth its argument in opposition, thereto. AFSCME filed responsive argument on or about June 21, 2010.

FACTS

Based upon review of the pleadings, there are no substantive factual disputes. The relevant facts are as follows.

On or about On December 21, 2009, AFSCME filed an initial unfair labor practice charge in which it alleges DSU has engaged in conduct which violates 19 Del.C. §1307 (a)(1), (2), (3), (5), and (7). *AFSCME Council 81, et al v. Delaware State University, ULP 09-12-725.* That Charge alleges DSU has engaged in a "concerted effort to undermine the

Union, to render the Union powerless, and [to] make the very concept of a Union superfluous by engaging in open disregard for its responsibility as a public employer to bargain with the Union as well as the use of subterfuge to evade the CBA and the requirements of 19 Del.C. Chapter 13." *Charge* ¶5. The Charge includes, in part, allegations that grievances are not processed, that bargaining unit work is being contracted out, that bargaining unit positions are being retitled (under the guise of creating new positions) in order to remove positions from the bargaining unit, that DSU is engaged in harassing and intimidating Union officers, and that the process for posting and filling vacancies is being disregarded. *Probable Cause Determination, p. 4602.* That Charge is currently being processed by PERB and a multiple days of hearing have been scheduled.

On or about March 23, 2010, the Union's counsel sent a letter to the University President which stated:

> ... We are requesting information related to work that is being performed or soon will be performed by non-University employees under contract with the University. We are asking that the information be provided in accordance with the University's obligation under the Freedom of Information Act as well as the University's obligation as a public employer under Title 19 Chapter 13 of the Delaware Code. Access to and copies of the following documents are being requested
>
> 1. For the period from FY 2007-FY 2010, copies of all notification of bids, the scope of work to be performed, the cost of equipment, labor, materials, and profit allowed, the bids submitted, the document announcing the winner of the bid, a copy of the contract entered into by the University and the selected bidder.
> 2. For the period from FY 2007-FY 2010, copies of all announcements advertising the solicitation of the bids and all correspondence including, but not limited to, letters and emails referencing the various bids, offers and acceptance.
> 3. For the period from FY 2007-FY 2010, copies of all documents identifying the source of funding for the contracts awarded.

4. Documents for the period from FY 2007-FY 2010 showing total amount paid to the contractors identified in response to questions 1 through 3 above and how much was actually paid to the contractor(s).

5. The number of employees laid off by the University as a result of the contracting of work to outside sources; i.e., mailroom, by way of example only.

6. A list of the funded positions included in the University's budget and submissions to the General Assembly in each of the three locals by job title for FY 2009, FY 2010, and FY 2011.

7. A list of positions by bargaining units that have been abolished in FY 2008, FY 2009, FY 2010, and projected for FY 2011.

8. A list of non-teaching positions that have been created during FY 2009, FY 2010, and budgeted for FY 2011.

9. The names and job titles of employees as well as rate of compensation paid to employees who were in the bargaining unit positions at the start of FY 2008 that were subsequently employed in positions outside of the bargaining unit and the compensation being paid to those employees.

10. Names of any employees in the bargaining unit that have received an increase in compensation outside the negotiated increases starting in FY 2009 and continuing.

11. The names of employees and the position title for all employees that have left the employment of the University by voluntary and involuntary terminations including people retiring or who have died during FY 2008, FY 2009 and FY 2010.

12. A list of all non-teaching positions funded by grant money and a copy of the grant application and grant award that provide the funding for the non-teaching positions.

As was mentioned above, this request for information is both under FOIA as well as by virtue of the Union's right to information needed to properly enforce terms and conditions of employment contained in the respective collective bargaining agreement. (In general, as well as specifically by way of example, to determine whether the University has breached terms of the existing collective bargaining agreement by assigning bargaining unit work to non-bargaining unit employees and/or non-University (outsourcing) personnel including employment subcontracting agencies to perform work that was performed by members of the bargaining units represented by Council 81's Local Unions.)

> Some of this information was requested by Mr. Selby in his memorandum of March 2, 2009 (copy attached). As he has not had the courtesy of a response, Council 81 is now enforcing its rights to the information:
>
> * Empire Paint Company Projects
>
> 1. Village Café
> 2. ROTC Cottage
> 3. U.L. Washington Extension Building
>
> * Johnson Construction Company Projects
>
> 1. Warren Franklin: Painting, Repairs, Installing Blinds
> 2. Alumni Stadium: Paint Concession Stands; Renovate Girls Soccer Locker Room and Paint; Bleacher Repaired, Numbered, and Painted; Hand Rails Painted in Same Area
> 3. Conrad Hall: 2nd Floor Renovation of Restroom (Men's Basketball Office Area) Pierce Fencing Company Project
>
> * Loockerman Hall Fence Project and Painting of the same
>
> Please contact me if you have any questions or wish to discuss this matter further. *Charge, Exhibit 1.*

The Assistant Vice-President for Legal Affairs for the University responded by email on April 5, 2010, in relevant part:

> The records you have requested, i.e., information relating to the University's retention of independent contractors, are not public records as defined by the Delaware Freedom of Information Act in that they pertain to pending or potential litigation which are not records of any court. See 29 Del.C. §10002(g)(9). In particular, as you know, AFSCME has recently initiated an unfair labor charge with the Public Employment Relations Board, charging the University with violations of the Public Employment Relations Act for, among other things, its use of independent contractors to perform work on campus. In connection with the ULP proceeding, for which the University is represented by counsel, the University will respond to valid, relevant requests for documents and information consistent with the rules and schedule established by the hearing officer. At this time, it would be inappropriate for the University to respond to your collateral request pursuant to the Freedom of Information Act.
>
> Should you wish to discuss this matter further, you may contact the University's counsel... *Charge, Exhibit 2.*

POSITIONS OF THE PARTIES

AFSCME: AFSCME asserts the law is well settled in Delaware that public employers have a duty to provide information in response to a certified exclusive bargaining representative's request. If further argues DSU has asserted no defense under which it could avoid complying with the established law and the remainder of DSU's affirmative defenses are without legal substance.

University: In opposing the Motion, the Respondent contends that: 1) The request for information submitted by AFSCME on March 23, 2010, is overly broad in that AFSCME seeks documents that date back over four (4) years and beyond the statutory one-hundred eighty (180) day period for filing an unfair labor practice charge beyond which PERB has no jurisdiction to process the charge; 2) "The present collective bargaining agreements for the Union expired on June 30, 2008. Since that time, the parties have been in negotiations for successor agreements. The information sought for the period preceding those negotiations is irrelevant to the enforcement of those expired contracts nor the negotiations of successor agreements"; 3) The request for information submitted by AFSCME on March 23, 2010, is broader than what is necessary for AFSCME to determine the University's compliance with the relevant agreements and is, therefore, overly burdensome; 4) AFSCME's request for information does not seek a public record, as defined by FOIA; and 5) The University is willing to provide some of the information requested.

The University set forth its willingness to comply with some of AFSCME's request in the final section of its argument in opposition to the Motion for Summary Judgment:

> First, the University has already responded to Request No. 5. In its verified response to the Union's first ULP, as well as its response to the Union's request for a temporary restraining order, the University averred that no University employee has been laid off as a result of contracting of work to outside sources. Second, the University has recently provided each of the Local Unions with

seniority, termination, and new hire reports which effectively respond to Request No. 11.

With regard to the remaining requests, the University can commit to providing[1] the Union with the following information for fiscal year 2009 and fiscal year 2010: (a) requests for bids and bids awarded by the University to third party contractors [Request Nos. 1 and 2]; (b) a list of positions that have been eliminated, removed or added to the bargaining units [Request Nos. 7 and 8]; (c) a list of bargaining unit employees, including their positions, in fiscal year 2008 [Request No. 9]; and (d) a list of any bargaining unit employees (if any) who have received a salary increase in excess of the increase afforded to all unit employees [Request No. 10.]. The remainder of the requests (Nos. 3, 4, 6, and 12) do not seek public records, are unreasonable on their face, are harassing and overly burdensome, and do not advance the Union's interest in ensuring compliance with the relevant CBAs.

DISCUSSION

Summary Judgment (or judgment on the pleadings) is appropriate when the pleadings do not establish a genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. The material facts in this case are not in dispute and the parties were provided with the opportunity to file written argument, which was considered in reaching this decision.

AFSCME's request for information on March 23, 2010, was based on both the Delaware Freedom of Information Act ("FOIA", 29 Del.C. Chapter 100) and the Public Employment Relations Act ("PERA", 19 Del.C. Chapter 13). PERB has previously held that an employer has the duty to provide requested information which is necessary for the exclusive bargaining representative to fulfill its statutorily required representational responsibilities. *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA*, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed Colonial*

[1] The University stated it would "require additional time to collect the information sought" but assured that "a diligent effort is, however, underway."

Education Assn. v. Bd. of Education, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA, v. Brandywine School District*, Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986)); *AAUP v. DSU*, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001).

The duty to provide information is well-settled under PERB case law. The information required to be provided under the PERA is broader than that covered by FOIA.[2] The Public Employment Relations Act requires that if not otherwise privileged[3], the employer has a duty to provide information that "includes access to relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue." *NCCEA/DSEA/NEA v. Brandywine School District,* Del. PERB, 131, 149 (1986).

The 180-day statute of limitations for filing an unfair labor practice charge does not limit a request for information. Should the Union conclude after reviewing the requested information it reveals conduct which may rise to the level of an unfair labor practice, the statute of limitations would be applicable to the filing of a charge. The information AFSCME requests, however, is limited to the terms of the current agreements and is justified by the union's responsibility to administer and police those agreements.

The Union has a right to information necessary for it to police and administer a current collective bargaining agreement and/or to prepare for and participate in meaningful

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[2] The Department of Justice issued its Opinion with respect to the University's obligation under FOIA. A copy of that decision is attached to this decision.

[3] The University does not argue privilege as a reason for declining to provide the information requested by the Charging Party.

negotiations over the terms of a successor collective bargaining agreement. Consequently, a request for information concerning subcontracting activity during the term of a current collective bargaining agreement cannot be considered irrelevant or baseless overreaching by the Union.

The Union's request for information is not solely for the purpose of determining compliance with the relevant collective bargaining agreements. While the Union's request for information is comprehensive, considering the pending unfair labor practice charge and the ongoing contract negotiations for a successor Agreement, I do not find it to be overly broad.

> An employer, on request must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 867 (2006). The duty to provide information includes information relevant to contract administration and negotiation. *National Broadcasting Co.*, 352 NLRB 90, 97 (2008); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).
>
> Where the requested information concerns terms and condition of employment of employees within the bargaining unit, the information is presumptively relevant, and the employer has the burden of proving lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Where the information sought concerns employees outside the bargaining unit, the union must show that information is relevant to its representative functions. *Dodger Theatricals*, supra at 14; *Bryant Stratton Business Institute*, 321 NLRB 1007, 1013 (1996). Although the union has the burden of showing the relevance of nonunit information, that burden is not exceptionally heavy, requiring only a showing of probability that the desired information is relevant, and that it would be of use to the union in carrying out its duties and responsibilities. *Certco Distribution Center*, 346 NLRB 1214, 1215 (2006); *Bryant Stratton* (Supra); *American Benefit Corporation and Teamsters Local Union No. 505,* 354 NLRB 129 (2010).

AFSCME has raised a substantial concern that the integrity of the bargaining unit(s) is being eroded by the University. The Union asserts it has observed the misclassification of positions, suspects violations of negotiated wage rates and the transfer of bargaining unit

functions to new or reclassified positions which it asserts the University has unilaterally determined are not bargaining unit positions, and that bargaining unit work is being improperly sub-contracted in violation of the parties' collective bargaining agreement. The information AFSCME requests in its March 23 letter directly relates to these concerns.

Further, where requested information relates to a potential grievance, the test for relevance is liberal. The United States Supreme Court in *NLRB v. Acme Industrial Co.*[4] held that a "liberal" broad "discovery type" standard must apply to union information requests related to the evaluation of grievances.

> Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in Moore's Federal Practice that 'it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial ... Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy.'[5] [NLRB] precedent continues to abide by this standard. As the [NLRB] explained in *Pennsylvania Power Co.,* 301 NLRB 1104, 1105 (1991):
>
> > .. the information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided.
> > ... Moreover, information of 'probable relevance' is not rendered irrelevant by an employer's claims that it will neither raise a certain defense nor make cert factual contentions, because 'a union has the right and responsibility to frame the issue and advance whatever contentions it believes may lead to a successful resolution of a grievance.' Further, because the Board, in passing on an information request, is not concerned with the merits of the grievance, it is also not 'willing to speculate regarding what defense or defenses an employer will raise in an arbitration proceeding.' *American Benefit Corp.* (Supra.).

[4] 385 U.S. 432 (1967)
[5] 385 U.S. at 437, fn 6, quoting 4 Moore Federal Practice P26.16[1], 1175-1176 (2d.ed).

Without disclosure of this type of information, both contract negotiations and the institution of the grievance and arbitration procedures are hampered. The purpose of the statute is to facilitate effective collective bargaining relationships. The open, honest, and good-faith exchange of information is a cornerstone of an effective relationship and is protected by the PERA.

The duty to furnish information requires a reasonable, good faith effort to respond in a timely manner to the union's request for information. Delaying response through the protracted use of defenses which are not predicated on the existing law, violates both the letter and the spirit of the PERA. "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of §8(a)(5)[6] inasmuch as the Union is entitled to the information at the time it made its initial request, and it was the Respondent's duty to furnish it as promptly as possible." *Woodland Clinic*, 331 NLRB 735, 737 (2000).

DSU cannot continue to rely upon its position that it will only respond to a "properly tailored request for information." The University is required to respond to the union's request by providing information consistent with its obligations under the statute. If the University has questions or concerns about exactly what information the union is seeking, it must respond by requesting specific clarification. General, broad brush responses that the employer will only respond to "valid, relevant requests for documents" violate the employer's good faith obligations under §1307(a)(5).

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[6] §8(a)(5) of the National Labor Act (29 U.S. Code Chapter 7) provides it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §9(a)." This provision parallels 19 Del.C. §1307(a)(5). Delaware District Court held in *Cofrancesco v. City of Wilmington*, 419 F. Supp 109 (1976), "... In cases where the problems raised under Delaware's labor laws are similar to those that arise under the NLRB, Delaware could be expected to consider and in all likelihood follow federal law."

DECISION

For the reasons set forth above, Charging Party's Motion For Judgment On The Pleadings is granted.

The requested information is to be provided to the Charging Party's counsel not later than twenty (20) days from the date of this decision.

July 22, 2010
(Date)

Charles D. Long, Jr.,
Delaware Public Employment Relations Board

JOSEPH R. BIDEN, III
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July 15, 2010

Perry F. Goldlust, Esquire
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RE: Freedom of Information Act Complaint Against Delaware State University

Dear Mr. Goldlust:

On May 21, 2010, the Delaware Department of Justice (DDOJ) received your May 20, 2010 letter alleging that Delaware State University (DSU) had violated the Freedom of Information Act, 29 *Del. C.* ch. 100 (FOIA), in refusing to provide you with public records. On May 24, 2010, we sent your complaint to DSU, and received their timely response on June 4, 2010. This is the DDOJ determination of your complaint, pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

In December 2009, while AFSCME Council 81, Local Unions 1007, 1267 and 2888 ("the Union") and DSU were negotiating a successor to their existing collective bargaining agreement, the Union filed an unfair labor practice complaint with the Delaware Public Employment Relations Board ("PERB") against DSU. In connection with that complaint, on March 23, 2010, you made a written FOIA request to DSU for

records that you stated were "needed to properly enforce terms and conditions of employment contained in the respective collective bargaining agreement." The records requested were:

1. For the period from FY 2007-FY 2010, copies of all notification bids, the scope of work to be performed, the cost of equipment, labor, materials, and profit allowed, the bids submitted, the document announcing the winner of the bid, a copy of the contract entered into by the University and the selected bidder.
2. For the period from FY 2007-FY 2010, copies of all announcements advertising the solicitation of the bids and all correspondence including, but not limited to, letters and emails referencing the various bids, offers and acceptance.
3. For the period from FY 2007-FY 2010, copies of all documents identifying the source of funding for the contracts awarded.
4. Documents for the period from FY 2007-FY 2010 showing the total amount paid to the contractors identified in response to requests 1 through 3 above and how much was actually paid to the contractor(s).
5. The number of employees laid off by the University as a result of the contracting of work to outside sources; i.e., mailroom, by way of example only.
6. A list of the funded positions included in the University's budget and submissions to the General Assembly I each of the three locals by job title for FY 2009, FY 2010 and FY 2011.
7. A list of positions by bargaining units that have been abolished in FY 2008, FY 2009, FY 2010 and projected for FY 2011.
8. A List of non-teaching positions that have been created during FY 2009, FY 2010 and budgeted for FY 2011.
9. The names and job titles of employees as well as rate of compensation paid to employees who were in the bargaining unit positions at the start of FY 2008 who were subsequently employed in positions outside of the bargaining unit and the compensation being paid to those employees.
10. Names of any employees in the bargaining unit that have received an increase in compensation outside of the negotiated increases starting with FY 2009 and continuing.
11. The names of employees and the position title for all employees that have left the employment of the University by voluntary and involuntary terminations including people retiring or who have died during FY 2008, FY 2009, and FY 2010.

12. A list of all non-teaching positions funded by grant money and a copy of the grant application and the grant award that provide the funding for the non-teaching positions.

By email of April 5, 2010, DSU advised you that it would not produce any of the records because "they pertain to pending or potential litigation which are not records of any court," citing 29 *Del. C.* § 10002(g)(9).

On or about April 20, 2010, the Union filed another charge of unfair labor practice arising out of DSU's refusal to provide the documents requested, citing 19 *Del. C.* § 1307(a)(8)(unfair labor practice for public employer to deny any public record as defined by FOIA). Both the 2009 and the 2010 complaints are pending.

RELEVANT STATUTES

The Delaware Freedom of Information Act was enacted to so that "citizens have easy access to public records in order that the society remain free and democratic."[1] 29 *Del. C.* § 10001. FOIA requires that the public must have "reasonable access to" public records for "inspection and copying." 29 *Del. C.* § 10003(a). The only records of DSU that are public records for purposes of FOIA are "documents relating to the expenditure of public funds," 29 *Del. C.* § 10002(d), subject to the exclusions listed in 29 *Del. C.* § 10002(g). FOIA excludes from the definition of "public record" "[a]ny records pertaining to pending or potential litigation which are not records of any court[.]" 29 *Del. C.* § 10002(g)(9).

[1] While FOIA refers throughout to "citizens," restricting the rights created by FOIA to only citizens of Delaware has been held unconstitutional. *Lee v. Minner*, 458 F.3d 194 (2006). Therefore, we will use the term "public" rather than "citizens."

The General Assembly enacted the Public Employment Relations Act (PERA), 19 *Del. C.* ch. 13, "to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer." 13 *Del. C.* § 1301. To further those purposes, the General Assembly charged the PERB with the responsibility to "resolv[e] disputes between public employees and public employers . . ." arising under the PERA. *Id.* § 1301(3). PERB has the power and the duty "to prevent any unfair labor practice . . . and to issue appropriate remedial orders." 19 *Del. C.* § 1308(a). PERB has the authority to hold hearings, take depositions, and to subpoena records. 14 *Del. C.* § 4006(h)(2); 19 *Del. Admin. C.* § 3002 ¶ 7. The Court of Chancery hears appeals from PERB, and PERB may petition that court to enforce PERB's orders. 19 *Del. C.* § 1309.

DISCUSSION

The definition of a public record describes documents in existence at the time the request is made. 29 *Del.C.* § 10002(g). FOIA does not require DSU to create a document in response to your request. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975). According to DSU, there are no records in existence that respond to items 5-12 of your request. Therefore, it has not violated FOIA in not producing the information requested in items 5-12.

Items 1-4 ask for records that are public records: records created or received by DSU relating to the expenditure of public funds. DSU maintains that the 2009 PERB complaint is pending litigation, and that because items 1-4 pertain to that litigation, they are therefore not public records under 29 *Del. C.* § 10002(g)(9) (the exception to the

definition of "public record" for documents "pertaining to pending or potential litigation which are not records of any court"). The question for our determination is whether a PERB proceeding is "litigation" within the meaning of § 10002(g)(9).

A PERB proceeding resembles litigation, in that adversarial parties have their rights and responsibilities determined by a neutral body. However, PERB does not give the parties a right to discovery, that is, to a pre- hearing, formal exchange of information, for which a non-complying party can be sanctioned. While the PERB may subpoena records, exercise of the subpoena power would be discretionary. 14 *Del. C.* § 4006(h)(2). Unlike the civil court rules, neither the PERA, 19 *Del. C.* ch. 13, nor section 4006 of title 14 of the Delaware Code, nor PERB's rules, 19 *Del. Admin. C.* § 3002, provides for the parties to have a ***right*** to receive documents from the opposing party. *Cf.*, *e.g.*, Super. Ct. Civ. R. 26 (discovery generally), 34 (discovery of documents), 37 (sanctions).

We have previously rejected the absence of discovery as determinative of whether administrative proceedings are litigation for purposes of FOIA, and focused on what we called the "quasi-judicial" character of an administrative proceeding. *Op. Att'y Gen. 03-IB10*, 2004 WL22931612 (Del. May 6, 2003) *reconsideration denied, Op. Att'y Gen. 03-IB26,* 2003 WL 22931613 (Del. Nov. 13, 2003) (county Planning Board); *see Op. Att'y Gen. 04-IB04*, 2004 WL 335476 (Del. Feb. 5, 2004)(arbitration proceeding). However, our focus should not be solely on the quasi-judicial nature of an administrative proceeding or on the availability of discovery as of right.

Instead, we should balance the public body's right to the exception with the public nature of the records requested. In this dispute, DSU's right to the exception is not clear. While it is arguable that, where a forum does not provide formal discovery, a party to a proceeding should not be able to use FOIA to improve his position, *see Office of the Public Defender v. Del. State Police*, 2003WL 1769758, at *3 (Del. Super. 2003) ("[T]he legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts' rules of discovery."), it is equally justifiable to say that the lack of discovery as of right distinguishes administrative proceedings from litigation. The rights FOIA creates are construed broadly, while the exceptions to those rights are construed narrowly. *Am. Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, at *3 (Del. Super. March 15, 2007); *see Del. Solid Waste Auth'y v. News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984). When considering two possible interpretations of FOIA, we have to favor disclosure. *See Layfield v. Hastings*, 1995 WL 419966, at *2-3 (Del. Ch. July 10, 1995).

Moreover, the records in question are clearly of a public nature: they relate to the DSU's expenditure of public funds. [2] This is not a case where the benefit of disclosure is strictly private. *Cf., Office of the Public Defender, supra.* The public has an interest in a state university's expenditure of public funds. Because DSU does not have a clear right to the pending litigation exception, whereas the requested records are clearly public and their disclosure could have public significance, we find that the pending litigation exception does not apply.

[2] In fact, most of them are probably in the public domain.

CONCLUSION

DSU did not violate FOIA by refusing to create records in response to your request numbers 5-12. However, the records described as items 1-4 are public records within the meaning of FOIA. DSU must promptly make those records available to you, although privileged or confidential matter may be redacted if DSU provides you with a brief description of and explanation for the redactions (for example, "email, X to Y, dated x/x/xx, attorney-client privilege").

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis, State Solicitor

cc: Opinion Coordinator
Sarah E. DiLuzio, Esquire